

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

August 14, 2007

Derek Seal, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13807
Austin, Texas 78711-3087

Re: **SOAH Docket No. 582-06-0568; TCEQ Docket No. 2005-1899-MWD;**
Application of Far Hills Utility District for Water Quality Permit
No. WQ001455-001 in Montgomery County

Dear Mr. Seal:

I have reviewed the exceptions filed by the parties and, for the most part, the exceptions repeat the arguments made at the hearing. However, I wish to respond to some of the contentions raised by the parties.

1. **Regionalization Issue:** Applicant asserts that the agreement between it and MCUD No. 2 is "dispositive proof" of MCUD's unwillingness and inability to continue to treat Applicant's present and future wastewater needs. The record, however, supports a finding that MCUD's Seven Coves Plant, located about two miles northwest of Applicant's proposed site, is able to continue meeting the needs of Applicant's current 302 residential connections (serving a population of approximately 591 people) after making certain repairs and rehabilitation of the lift stations at a cost of approximately \$393,500. (See Ex. A-5 at 4-5; see also Ex. A-4-4.)

Regarding Applicant's future growth and need for increased capacity, the only evidence of what that growth will be is a projection, put forth by Jim Haymon, president of Applicant's board, that Applicant in the future will serve a total of 1,021 connections. However, there is no indication of approximately *when* Applicant will need the increased capacity, other than Mr. Haymon's unsupported statements that Applicant will serve "an additional 600 connections in the coming years" and "at full build-out of the subdivisions" that Applicant serves. (Ex. A-4 at 4 and 5.)

Furthermore, I disagree with Applicant's argument that the Commission has no authority to consider need unless there actually is a designated or proposed regional provider.

William P. Clements Building
Post Office Box 13025 ♦ 300 West 15th Street, Suite 502 ♦ Austin Texas 78711-3025
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994
<http://www.soah.state.tx.us>

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Applicant fails to consider that Water Code § 26.081, entitled "Regional or Area-Wide Systems; General Policy," reads in pertinent part as follows:

- (a) The legislature finds and declares that is necessary to the health, safety, and welfare of the people of this state to implement *the state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems* to serve the waste disposal needs of the citizens of the state and to prevent pollution and maintain and enhance the quality of the water in the state.

* * *

- (c) In those portions of the state which are not within a standard metropolitan statistical area [such as Lake Conroe], *the commission shall observe this state policy of encouraging interested and affected persons to cooperate in developing and using regional and area-wide systems*. The commission may not use the procedure specified in Sections 26.081 through 26.086 of this code in those areas to implement this policy. However, this does not affect or diminish any authority which the commission may otherwise have and exercise under other provisions of this chapter. (Emphasis added.)

Rather than limiting the Commission's authority to take into account need when considering the issuance of a permit to discharge waste, the Water Code makes it clear in both Sections 26.0282 and 26.081 that the Commission must observe the state policy of encouraging and promoting the development and use of regional and area-wide disposal systems and may deny a proposed permit based on the availability of existing area-wide waste systems.

2. **Wetlands issue:** Applicant argues that a U. S. Army Corps of Engineers' (Corps) determination of wetlands constitutes a federal determination of wetlands and that Sections 11.502 and 11.506 of the Water Code require the Commission to adhere to a federal determination of wetlands in administering any of its rules concerning wetlands. I disagree.

What Applicant fails to note is that Sections 11.502 and 11.506 address *definitions* of wetlands, not a determination or delineation of jurisdictional wetlands. Contrary to Applicant's assertion, there is no conflict between the state and federal definition of "wetlands." As discussed in my proposal for decision, *jurisdictional wetlands* are a subset of "waters of the U.S." and thus subject to the Clean Water Act that authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material into the waters of the U. S. Both Dr. Jacob and Mr Laskowski used the Corps' Manual that provides guidelines and methodology for determining whether an area is a wetland for purposes of Section 404.

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However, a Corps' determination that an area is or is not a wetland for purposes of Section 404 is irrelevant in the Commission's determination of unsuitable site characteristics for locating a sewage treatment plant. As stated in Section 309.10)b) of Commission rules, in pertinent part, "[t]he purpose of this chapter is to condition issuance of a permit. . . on selection of a site that minimizes possible contamination of ground and surface water. . . and to prohibit issuance of a permit for a facility to be located in an area determined to be unsuitable. . . ."

Dr. Jacob delineated wetlands at the site of Applicant's proposed wastewater treatment facility. I found his testimony more credible and his delineation of wetlands more persuasive than Mr. Laskowski's for the reasons set forth in my PFD. Although Applicant asserts that Dr. Jacob's study contained deficiencies and errors, I noted in my analysis that I concurred with Capps' assertion that Dr. Jacob clearly considered hydrophytic vegetation, wetland hydrology, and hydric soils in his delineation and that Dr. Jacob's considerations were amply set out in Capps' argument. Capps' argument also included Capps' responses to the alleged "deficiencies and errors" committed by Dr. Jacob, and I agreed with those responses.

3. **Whether Applicant's proposed discharge complies with the state water quality standard for dissolved oxygen (D.O.) and all applicable anti-degradation requirements:** Although I recommend the Commission deny Far Hills' application for a permit based on the above issues, I agree with the reasoning and arguments set forth in Applicant's reply to Capps' and the PIC's exceptions that, based on Ms. Holligan's modeling, Applicant's proposed discharge complies with the state water quality standard for D.O. in Lake Conroe. Also, I agree with the reasoning and arguments set forth in Applicant's reply to Capps' and the PIC's exceptions that Applicant's proposed discharge complies with all applicable anti-degradation requirements.

In conclusion, I recommend the Commission overrule all exceptions and deny Far Hills' application for a water quality permit.

Sincerely,

Carol Wood

Carol Wood
Administrative Law Judge

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

300 West 15th Street Suite 502

Austin, Texas 78701

Phone: (512) 475-4993

Fax: (512) 475-4994

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: FAR HILLS UTILITY DISTRICT

SOAH DOCKET NUMBER: 582-06-0568

REFERRING AGENCY CASE: 2005-1899-MWD

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ CAROL WOOD**

REPRESENTATIVE / ADDRESS

PARTIES

ERIC ALLMON
ATTORNEY
LOWERRE & FREDERICK
44 EAST AVENUE, SUITE 101
AUSTIN, TX 78701
(512) 482-9345 (PH)
(512) 482-9346 (FAX)

CAPPS CONCERNED CITIZENS

CHRISTINA MANN
ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OFFICE OF PUBLIC INTEREST COUNSEL
P.O. BOX 13087 MC-103
AUSTIN, TX 78711-3087
(512) 239-4014 (PH)
(512) 239-6377 (FAX)

OFFICE OF PUBLIC INTEREST COUNSEL

STEPHEN C DICKMAN
ATTORNEY
KELLY, HART & HALLMAN
301 CONGRESS, SUITE 2000
AUSTIN, TX 78701-2944
(512) 495-6413 (PH)
(512) 495-6401 (FAX)

FAR HILLS UTILITY DISTRICT

JOHN E WILLIAMS
STAFF ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
LITIGATION DIVISION MC-173
PO BOX 13087
AUSTIN, TX 78711
(512) 239-0455 (PH)
(512) 239-0606 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

RALPH & MARCIA SANDALL
10213 VALLEY DRIVE SOUTH
WILLIS, TX 77318-6446
(936) 856-7651 (PH)

RALPH & MARCIA SANDALL

W. B. KELLUM
MANAGER
SAN JACINTO RIVER AUTHORITY
P.O. Box 329
CONROE, TX 77305
(936) 588-1111 (PH)

SAN JACINTO RIVER AUTHORITY

xc: Docket Clerk, State Office of Administrative Hearings